

**TORT LIABILITY: A HANDBOOK FOR EMPLOYEES  
OF THE VIRGINIA DEPARTMENT OF TRANSPORTATION  
AND VIRGINIA MUNICIPAL CORPORATIONS**

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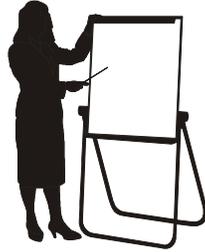
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## INTRODUCTION



Transportation agencies and their employees have always been concerned with providing safe roadways for the public. In recent years, the concern for safety has expanded to include concerns about the high cost of suits brought by those who have suffered injury or property damage due to the negligence of the state or its employees. With the recent court rulings concerning state government liability and the publicity of large damage awards, the issue of tort liability has become a significant concern of governments and their employees.

Although the field of tort law has a solid foundation with its own terminology, it is in constant flux. To understand the concept of tort liability completely, one must first understand the terminology and the basic structure of a tort case—from the initial injury through the final disposition of the case. This handbook is intended to serve as a guide to these basic, yet important, concepts of tort liability.

Although most work situations present clear-cut indications of what are and are not possible torts, in many cases employees can rightfully question the potential tort implications of their actions. This handbook presents a broad outline of what constitutes a tort and identifies specific instances that may lead to legal liability.

*This handbook is not a definitive legal guide to the ins and outs of tort liability in the Commonwealth.* Rather, it aspires to arm the employees of VDOT and of Virginia's municipal corporations with sufficient information to allow them to make informed and considered decisions in contexts that could lead to a tort claim against their employer or themselves.



## WHAT IS TORT LIABILITY?



A **tort**<sup>1</sup> is any civil wrong or injury to a person or to property attributable to the violation of a **duty** owed to the injured party. *Tort law*<sup>2</sup> is the set of rules that determines when one party must compensate another party for personal injuries or property damage. In a *tort case*, the **plaintiff** (the person bringing the claim) is usually the injured party who is suing the **defendant** (the alleged wrongdoer) for compensation from damage.

### Distinguishing Torts from Other Legal Concepts

Torts are distinguished from three related, but different, legal concepts: (1) a **crime**, (2) a **breach of contract**, and (3) **workers' compensation**.

#### (1) Crime

A **crime** is the violation of a **right** or **duty** due to the entire community, usually as determined by legislation. Legal redress for a crime is pursued by the government, with the desired end of punishment for the violation of the law. A **tort** is the violation of a **right** or **duty** due to a private party, usually as determined by the **common law**. Redress for a **tort** is pursued at the discretion of the injured party or his or her representative, with the desired end of reparation for the injury or damage to property.

#### (2) Breach of Contract

A **breach of contract** is the failure of a contracting party to perform any promise that forms either the whole or a part of a contract. A party injured by **breach of contract** would not sue for damages under the tort law; rather, he or she would sue under contract law.

#### (3) Workers' Compensation<sup>3</sup>

**Workers' compensation** is a form of insurance used to provide compensation to employees who are injured in the course of their employment. The insurance protects an employer (such as the Commonwealth) against legal liability for the injury. Workers' compensation provides recovery for three types of work-related injuries: those that (1) *are*

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<sup>1</sup>**Boldface** terms are defined in the *Glossary* at the end of this handbook.

<sup>2</sup>Italicized terms indicate the importance of that concept or word in that sentence or paragraph.

<sup>3</sup>Va. Code § 65.2-100 et seq. (Michie 2002); §§ 2.2-2821, 38.2-119.

caused by an accident, (2) arise out of the employment, and (3) occur in the course of employment. **Negligence** is not a necessary element of a workers' compensation claim.

## Defining the Terms in Workers' Compensation Claims

### (1) *Caused by an accident*

The accident may arise from **negligence** or even from actions done with the intent or purpose to injure.

#### Example

A child in the back of a car traveling through a work zone throws a rock at a highway worker, causing injury to the highway worker. This would be considered an *accident*. Based on reasoning in *Continental Life Ins. v. Gough*, 161 Va. 755, 172 S.E. 264 (1934).<sup>4</sup>

### (2) *Arise out of the employment*

Injuries are said to arise out of the employment when the employment was a contributing **proximate cause** of the injury. An injury does not arise out of the employment if it was caused by a hazard to which the worker would have been exposed apart from the employment.

#### Example

A VDOT employee transporting dynamite to a blasting site is beaten by an assailant who wants to hijack the vehicle for its contents. Since the assault occurred because the assailant sought to obtain the dynamite that the VDOT employee was transporting, the injury *arose out of the employee's employment*. Based on reasoning in *Metcalfe v. A.M. Express Moving Systems, Inc.*, 230 Va. 464, 339 S.E.2d 177 (1986); *Richmond Newspapers v. Hazelwood*, 249 Va. 369, 457 S.E.2d 56 (1995); *Dan River, Inc. v. Giggets*, 34 Va. App. 297, 541 S.E.2d 294 (2001).

### (3) *In the course of employment*

Injuries are said to occur in the course of employment when the employee is injured while fulfilling the duties of his or her employment.

#### Example

A VDOT engineer is inspecting a bridge pursuant to his job duties and the ground underfoot gives way, tossing the engineer into a gully and causing him injury. The injury occurred *in the course of his employment*. Based on reasoning in *Metcalfe v. A.M. Express Moving Systems, Inc.*, 230 Va. 464, 339 S.E.2d 177 (1986).

#### (4) *Negligence*

**Negligence** on the part of the injured employee, co-employees, or employer is not relevant to the awarding of workers' compensation (although an employee's willful misconduct may bar recovery).

The key point of workers' compensation that relates to tort liability is that workers' compensation remedies are exclusive of all other remedies available to the injured employee. In other words, once the workers' compensation payment has been made, the injured employee will be legally barred from suing the employer or co-employees for damages.<sup>4</sup> Nevertheless, even if the employee collects workers' compensation, he or she is not barred from pursuing a suit against third parties, i.e., against non-employer or employee persons, for any tort damages.

#### **Example**

If a man driving through a work zone is searching for his cassette tape in his car rather than watching the road, veers out of his lane, and injures a VDOT road crew employee, the employee will most likely receive workers' compensation. In addition, the injured employee would still be able to file a tort claim against the driver for damages. Based on reasoning from *Walsh v. Ramsdell*, 51 Va. Cir. 393 (2000).

### **Elements of a Tort Claim**

Most lawsuits involving VDOT are based on the theory of **negligence**. In order to succeed in a **tort claim**, a **plaintiff** must prove four elements:

- (1) **Duty**
- (2) **Breach of duty**
- (3) **Proximate cause**
- (4) **Injury**

To prevail in a tort case, the plaintiff must prove the existence of each of these elements.

#### (1) **Duty**

**Negligence** is the breach of a legal duty. The concept of legal duty follows from the moral duty to conduct oneself in a manner so as not to injure another. Thus, a *legal duty*—that is, one that if breached may result in tort liability—is an obligation to exercise the standard of care necessary to reasonably protect the safety of person and property. A legal duty may arise from a statute, a municipal ordinance, or the relationship between parties.

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<sup>4</sup>The Virginia General Assembly created an exception to this exclusivity in Va. Code Ann. § 65.2-301 (Michie 2002). If the injury occurred due to a sexual assault, under particular circumstances, the injured party may sue the injurer, even co-employees or employers, in lieu of seeking workers' compensation.

A statute or municipal ordinance may set a standard of care or duty for a particular situation such that if it is shown that a person did not act in accordance with the standard of care prescribed, the person would be **per se** negligent. In other words, the mere violation of a statute or ordinance would be definitive proof of **negligence**.

#### Example

The Code of Virginia § 33.1-345 (1) makes it a crime to “cut or injure a tree within fifty feet of a road so as to render it liable to fall and leave it standing.” If a VDOT employee violated this statute, he or she may have been *per se* negligent in his or her actions for purposes of a civil tort or suit, thus rendering the Commonwealth, and possibly himself or herself, liable for damages. Based on reasoning in *Moskowitz v. Renaissance at Windsong Creek, Inc.*, 52 Va. Cir. 459. A plaintiff alleging that he or she was injured as a result of a VDOT employee violating a statute will have to show (1) “that the defendant violated a statute that was enacted for public safety, (2) that plaintiff belongs to the class of persons for whose benefit the statute was enacted, and that the harm that occurred was of the type against which the statute was designed to protect, and (3) that the statutory violation was a proximate cause of his injury.” *Id.*

This summary is not meant to indicate that an employee complying with the statute or ordinance has *not* acted negligently; Virginia law is to the contrary. In Virginia, even if a person has acted in accordance with a law, he or she may be found guilty of **negligence**. A person may have a duty to exercise a particular standard of care simply because he or she took actions or was in a position that could affect the safety of other persons or property. “In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable [person] to protect them against an unreasonable risk of harm [that could arise] out of the act.”<sup>6</sup>

Reasonable care requires the alleged wrongdoer have **notice** of the situation presenting the danger. Reasonable people would not act unless they knew there was a problem. **Notice** can be *actual*, as when a report has been filed with VDOT regarding a street defect or a police report mentions damage to a guardrail. **Notice** can also be *constructive*, meaning the responsible party *should have known* of the problem (proper diligence would have led to its discovery), as when a stop sign has been missing for several weeks or many accidents have occurred at a dangerous site.

Once **notice** is received, *actually* or *constructively*, the responsible party has a duty to remedy the problem within a *reasonable amount of time*. A *reasonable amount of time*, if not specified, depends on the amount of time it would take a *reasonable person* to remedy the problem. *Reasonableness* depends on the gravity of the danger and any other pertinent contingencies. Essentially, the determination of a reasonable amount of time may be a **question of fact** for the jury to answer, such as “Did the defendant fail to respond to the danger within the amount of time a reasonable person would have responded to protect persons and property?”

## Examples

- (1) A plaintiff fell in a hole caused by erosion. There was no showing of *actual or constructive notice* to the city, so the city was not liable. *Virginia Beach v. Roman*, 201 Va. 879, 114 S.E.2d 749 (1960).
- (2) A plaintiff's truck struck a raised manhole in a city street. The court found that evidence of prior accidents at the site that had occurred under substantially similar conditions served as *notice* to the city that a dangerous street condition existed. *Portsmouth v. Cilumbrello*, 204 Va. 11, 129 S.E.2d 31 (1963).

Nevertheless, persons engaged in activities that require expertise or other technical knowledge are held to a higher degree of care. For example, when dealing with issues concerning the design, maintenance, and construction of highways, a highway engineer has the duty to exercise the knowledge and skill of a reasonable and competent engineer, rather than the skill and knowledge of the mere average person.<sup>5</sup>

### (2) Breach of Duty

A person has breached his or her duty if through his or her actions or failure to act he or she did not meet the standard of care required under the circumstances. The **breach of duty** is commonly known as **negligence**.

### (3) Proximate Cause

A **proximate cause** is an act or omission that produces an event without which that event would not have occurred. It is important to note that there may be more than one proximate cause of any given injury. All a plaintiff must prove is that the defendant's negligence was one of the contributing proximate causes of the plaintiff's injuries.

### (4) Injury

The plaintiff must also show that **injury** resulted from the negligence. Damage may take the form of, among other things, death; personal injury, such as a broken leg; consequential damages, such as lost wages due to hospitalization; or property damage, such as a wrecked automobile.

Virginia law designates exceptions to the formula for finding liability for tort damages. The controlling legal concept in these cases is **strict liability**. Liability is strict when the tort complained of is an "ultrahazardous" activity—that is, one that cannot be made harmless with ordinary care. *Blasting* is a primary example of an activity that invokes **strict liability**. In **strict liability** cases, the court will allow liability even if the harm was unintended and the actions were not negligent. According to this law, to recover damages from a defendant, a party injured

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<sup>5</sup>Based on reasoning in *Spainhour v. B. Aubrey Huffman & Associates*, 237 Va. 340, 346, 377 S.E.2d 615, 619 (1989).

by blasting operations, whether due to flying debris or concussion and vibration, need only show that the defendant performed the blasting and that the blasting proximately caused injury.<sup>6</sup>

#### Example

- (1) VDOT plans, constructs, and maintains the state's bridges. The Bridge Over Troubled Waters has been in service for 25 years and is used by thousands of motorists annually. Recently, VDOT determined that the bridge needed reinforcement. Thus the bridge was partially dismantled, rendering it unfit for public use. The dismantled bridge would pose a hazard to oncoming drivers who were unaware of its incapacitation. During the reconstruction, VDOT had a *duty* to warn oncoming motorists that the bridge was gone. Nevertheless, in this instance, VDOT did not place warning signs. Thus, VDOT *breached its duty*. (VDOT was negligent.)
- (2) Before VDOT completed its reconstruction of the bridge, Paul Public drove toward the bridge unaware of the danger ahead. By the time Paul Public saw that the bridge was out, he did not have enough time to stop his vehicle safely. To avoid drifting off the road into Troubled Waters below, Paul Public slammed on his brakes and swerved into the guardrail. As a result of the crash, Paul Public suffered a broken collarbone, and his car was totaled. There was damage to both person and property. Because this damage would not have been sustained had VDOT placed adequate warning signs ahead of the bridge, VDOT's inaction becomes a *proximate cause* of the *damage* to Paul Public and his car.

Because each element of a tort was present, namely *duty*, *breach of duty*, *proximate cause*, and *injury*, Paul Public would have a legitimate tort claim.

#### Example

A subcontractor performed blasting pursuant to a contract with the state while carrying out roadwork on state property. The vibration and concussion from the blasting caused cracks to develop in the homes of persons living next to the state property. The subcontractor committed no negligence. The subcontractor is liable if the plaintiffs can show that the blasting caused cracks. *Laughon & Johnson, Inc. v. Burch*, 222 Va. 200, 278 S.E.2d 856 (1981).

Sometimes, when an accident has occurred, more than one entity may satisfy the elements of a tort, and, as a consequence, the injured party has more than one defendant against whom to bring a claim. Under **joint and several liability**, a common-law doctrine followed in Virginia, the injured plaintiff could win a judgment for the full amount of the claim from any one of the responsible entities even though other potential defendants were equally or even more responsible for the injury. In particular, where the negligent conduct of two or more potential defendants combines to produce a single indivisible result, each defendant may be held responsible for the entire injury.<sup>7</sup>

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<sup>6</sup>*Laughon & Johnson, Inc. v. Burch*, 222 Va. 200, 278 S.E.2d 856 (1981).

<sup>7</sup>*Bazemore v. Commonwealth*, 25 Va. App. 466, 489 S.E.2d 254 (1997).

# WHEN ARE THE GOVERNMENT AND ITS EMPLOYEES LIABLE FOR TORT-RELATED INJURIES?



## The Commonwealth of Virginia

Until recently, the Commonwealth enjoyed **sovereign immunity** for tort claims, which meant no one could sue the Commonwealth without its permission. In 1982, the Tort Claims Act (Act) took effect, diluting the doctrine of sovereign immunity and exposing the Commonwealth to a multitude of lawsuits:

[T]he Commonwealth shall be liable for claims for money . . . on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under the circumstances where the Commonwealth . . . , if a private person, would be liable to the claimant for such damage, loss, injury or death.<sup>8</sup>

The Act makes it clear that the Commonwealth may be held liable in situations in which a private entity or individual acting in the same manner would be held liable. The Commonwealth, as an employer, may be held liable for the negligence of its agencies, such as VDOT and its employees, under the doctrine of **respondeat superior**. This doctrine enables a person to sue the employer for damages caused by a negligent employee who while on the job in an official capacity injured that person. The rationale for this doctrine is that an employer should not be shielded from liability for injuries caused by employees who are acting at the employer's command. It follows from this rationale that an employer is not liable for damages caused by an employee engaged in purely private activities unconnected with his or her gainful employment.

The Commonwealth is liable for an employee's negligence when a plaintiff can show that (1) the employee was *acting within the scope of his or her employment* and (2) the *four elements of a valid tort claim are satisfied (duty, breach of duty, proximate cause, and injury)*.<sup>9</sup>

Claims against VDOT and its employees commonly fall into one of five categories:

1. *Maintenance*. These claims allege VDOT failed to correct hazardous roadway conditions (e.g., loose gravel, potholes, traffic light malfunctions) within a reasonable time.

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<sup>8</sup>Va. Code Ann. § 8.01-195.3 (Michie 2002).

<sup>9</sup>*Lilly v. Brink*, 52 Va. Cir. 182 (2000).

2. *General Hazards*. These claims allege damage caused by hazards created by design, construction, and maintenance problems (e.g., inadequate signing, low shoulders).
3. *Work Zones*. These claims allege damage caused by hazardous construction and maintenance zones (e.g., motor graders colliding with other vehicles, dust clouds).
4. *Operations*. These claims involve alleged hazards created by general operations and work zone activities that do not involve motorists (e.g., blasting, felled trees, splashed paint).
5. *Miscellaneous*. These claims do not fit into any of the other categories (e.g., trees cut on private property, debris on private property).

Although VDOT is not an insurer of the roads, i.e., it is not liable for every accident, it does have a duty to ensure that the roads are reasonably safe.<sup>10</sup> VDOT must make timely repairs of defects about which it knows or should know. The appropriate safeguard varies with the particular hazard present.<sup>11</sup> Thus, VDOT must make a determination of what warnings will reasonably protect motorists.<sup>12</sup>

The following are situations in which a lawsuit against VDOT went to trial and resulted in a judgment against VDOT. The VDOT claims reference provides the case number, district office, and residency.

- (1) A VDOT employee negligently flagged a tractor-trailer through a ditching operation, causing the trailer to run onto the shoulder and turn over. *A72-196 CU/Louisa*.
- (2) VDOT negligently failed to clean a box culvert properly, resulting in flood damage to the plaintiff's home. *A74-507 SA/Martinsville*.
- (3) VDOT negligently designed a highway, resulting in a rockslide that struck the claimant's refrigeration truck and caused a total loss of the truck and its cargo. *A74-864 BR/Wise*.
- (4) Due to VDOT's negligence in allowing a severe dust condition at a construction site, a motorcycle collided with an oncoming vehicle, resulting in personal injuries to the driver and damage to the motorcycle. *A75-116 CU/Louisa*.
- (5) VDOT was negligent in allowing a stop sign to be obscured by bushes, resulting in the death of a passenger in a vehicle whose driver ran the stop sign and was struck by another vehicle. *A75-939 SU/Suffolk*.
- (6) The plaintiff's vehicle collided with another vehicle at an intersection, causing injuries and damage to the vehicle. Both drivers claimed they had the green light. The court found VDOT negligent for improper maintenance of the traffic light. *A76-369 SU/Suffolk*.
- (7) The plaintiff entered Route 3 in Stafford County and was struck by an oncoming vehicle. The court found VDOT negligent for failure to install a stop sign. *A77-886 FR/Fredericksburg*.
- (8) The plaintiff was a passenger in a car that ran off the road to avoid a deer and struck a utility pole, resulting in injury. The court found VDOT negligent for not providing a safe distance from the edge of the road and the utility pole. *A79/681 ST/Luray*.
- (9) A loader backed over the plaintiff's vehicle, causing damage and injury. The jury found VDOT liable due to the employee's negligence in his operation of the loader. *A80-002 SU/Franklin*.

<sup>10</sup> *Cooke v. Pouleres*, 55 Va Cir. 148 (2001).

<sup>11</sup> *Habib v. Blanchard*, 25 Va Cir. 451 (1991).

<sup>12</sup> *Id.*

## Municipal Corporations

Virginia law treats municipal corporations differently than the Commonwealth for the purposes of tort liability. Though both the Commonwealth and its municipalities enjoyed **sovereign immunity** before the enactment of the Act, after its enactment, the Commonwealth's immunity was diluted and the municipalities' immunity continued. This continued immunity is not without limits; despite some immunity, various activities or omissions can lead to liability.

A municipal corporation has at least two functions: (1) **governmental functions** and (2) **proprietary functions**. **Governmental functions** are those that encompass duties imposed on the municipality by the Commonwealth for the common good. **Proprietary functions** are those undertaken for the special local benefit of the municipality or for financial benefit. The distinction between these functions is vague. In fact, court decisions addressing the functions sometimes seem contradictory. Nevertheless, the distinction is important because a municipality is immune from liability for negligence in the exercise of governmental functions but is liable for negligence in the exercise of proprietary functions.

### Governmental Functions

Traffic lights, blinking lights, warning signals, roadway markings, railings, barriers, guardrails, curbing, and similar devices are designed to control and regulate traffic and to ensure an orderly and safe flow of traffic on the streets. A determination of the need for such devices and the decision to install or not to install them are exercises of a **governmental function**. Thus, a municipality engaged in these actions may not be held liable for negligence.

#### Examples

- (1) A municipality negligently failed to repair a nonfunctioning traffic light. Holding the city *immune* from liability for damage resulting from a collision at the dangerous intersection, the court held that maintenance of traffic signals is a *governmental function* because the purpose of maintaining traffic signals is to regulate traffic and prevent vehicular and pedestrian accidents at the intersection. *Transportation, Inc. v. City of Falls Church*, 219 Va. 1004, 254 S.E.2d 62 (1979).
- (2) All occupants in a vehicle whose driver failed to negotiate a sharp curve and plunged into an adjacent river were killed. The plaintiffs alleged the city that designed the road was negligent for failing to provide sufficient lighting to warn of the existence of the sharp curve, failing to provide adequate roadway markings to indicate the contour of the street, and permitting excessive speed at the place at which the accident occurred. The court found these actions and omissions constituted *governmental functions*; thus, it held the city *immune* from liability for negligence. *Freeman v. City of Norfolk*, 221 Va. 57, 266 S.E.2d 885 (1980).

### Proprietary Functions

Maintaining streets and sidewalks in good repair and in a safe condition for travel is a **proprietary function**. Thus, municipalities may be held liable for **damages** resulting from defects and obstructions that arise as a result of employee negligence.

### Examples

- (1) A plaintiff was injured when a truck skidded on an icy street and struck the rear of her car. The ice had formed because of the town's negligence in maintaining its water pipes (a *proprietary function*). The town was charged with *negligence* for failure to maintain its streets and was denied the opportunity to claim immunity from liability. *Woods v. Town of Marion*, 245 Va. 44, 425 S.E.2d 487 (1993).
- (2) A plaintiff was injured and his car damaged when it fell into a deep hole in a city street. The hole, caused by settling of the earth where a sewer line had been placed months before, had not been repaired. The court found the city had notice of the sinkhole and was negligent in its failure to correct it or place protective barriers around it. The court awarded money damages to the plaintiff to be paid by the city. *City of Richmond v. Branch*, 205 Va. 424, 137 S.E.2d 882 (1964).

When a municipality is cleaning the street in response to emergency weather conditions, opening the streets to vital public services, its action constitutes the exercise of a **governmental function**, not routine street maintenance.

### Examples

- (1) A plaintiff was injured when he was struck by snow thrown from the blade of a snowplow that was being operated by a city employee engaged in snow removal. Because the snow removal operations were in response to a snow emergency, the acts were not *governmental*, or for the common good, so the municipality was immune for negligently caused injuries. *Bialk v. Hampton*, 242 Va. 56, 405 S.E.2d 619 (1991).
- (2) A plaintiff sustained injuries when a car struck a tree that had fallen, blocking the street, during a violent storm. The fallen tree was one of 800 downed trees blocking Norfolk streets in the wake of Hurricane Donna. The municipality was immune from liability for the damage because its effort to cope with the emergency was the exercise of a *governmental function*. *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962).

Although a municipality can claim immunity against negligence claims in cases involving a **governmental function** such as roadway design, plaintiffs may still have a **tort claim** alleging **nuisance**. As it relates to roadways, a **nuisance** is a condition that imperils the safety of a public highway and is dangerous and hazardous in itself.

A municipality can assert immunity from **nuisance** claims only under very limited circumstances: the condition claimed to be a nuisance must be authorized by law and the act creating or maintaining the nuisance must be performed without negligence. Under this doctrine, then, even when a municipality is immune from liability for negligence, a plaintiff may have a successful nuisance claim.

### Example

A municipality constructed a roadway in order to facilitate the development of an apartment complex. The city placed no signs, guardrails, lights, sidewalks, or curbs to mark the end of the street, which led to a creek. Although the city received complaints of the hazardous condition, it did nothing to remedy it. One night during a heavy rain, a driver drove off the road and into the flooded creek. The driver was killed. The court held that “if a municipal company creates or maintains a nuisance, it is not protected by the immunity doctrine unless (1) the condition claimed to be a *nuisance* [emphasis added] is authorized by law, and (2) the act creating or maintaining the *nuisance* [emphasis added] is performed without negligence.” *Taylor v. City of Charlottesville*, 240 Va. 367, 373, 397 S.E.2d 832, 836 (1990). The court held the city immune from liability for *negligence*, but it allowed the plaintiff to claim that the city had created a *nuisance*. *Id.*

## Employees

Traditionally, **sovereign immunity** has extended to employees of immune government entities. The Act preserved the immunity enjoyed by government employees, but the protection of immunity covers only some employee actions.

A government employee is liable for negligence in performing a **ministerial act**. A **ministerial act** is one that an employee performs in a prescribed manner in obedience to authority without the exercise of his or her own judgment. Typically, these acts are clearly defined tasks performed with minimum leeway as to personal judgment, and they do not require the weighing of alternatives. (A commonly cited example is highway maintenance.)

Nevertheless, when an act is considered **discretionary** or **supervisory**, a government employee may be protected by immunity. An act is considered to be **discretionary** if it has the following characteristics: (1) *an authorized individual or agency gave the employee the power and duty to make a decision*; (2) *the decision was made from a set of valid alternatives*; and (3) *the employee or agency exercised independent judgment in making the selection*. **Discretionary** acts are also called *planning functions*, such as design, allocation of resources, and allocation of labor.

### Discretionary Functions

The test for determining whether a government employee engaged in the exercise of **discretionary functions** and is therefore protected by immunity is set forth in *James v. Jane*.<sup>13</sup> The Virginia Supreme Court named four factors to be considered when determining an employee’s immunity: (1) *the function the employee was performing*; (2) *the extent of the state’s interest and involvement in the function*; (3) *whether the act performed involves the use of judgment and discretion*; and (4) *the degree of control and direction exercised by the state over the employee*.<sup>14</sup>

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<sup>13</sup>221 Va. 43, 282 S.E.2d 864 (1980).

<sup>14</sup>*Id.*

(1) *The function the employee was performing*

If the function is essential to a governmental objective (such as providing safe roadways to the public), immunity is more likely to apply to the employee than if the function has only a marginal influence on a governmental objective.

(2) *The extent of the state's interest and involvement in the function*

If the Commonwealth has a great interest and involvement in the function, immunity is more likely to apply than if the government's interest and involvement are slight.”

(3) *Whether the act performed involves the use of judgment and discretion*

If the use of judgment and discretion is an integral part of the employee's duties in carrying out a **governmental function**, this will weigh heavily in favor of the court's granting the employee immunity.

(4) *The degree of control and direction exercised by the state over the employee*

A high level of governmental control weighs in favor of immunity. State control by law may exist even though the employee exercises significant discretion in performing the activity.<sup>15</sup>

Employee immunity for **discretionary** acts applies only when the employee can be considered no worse than negligent in the performance of the acts in question. “A state employee may be liable for his conduct while performing work for the state if his conduct is wrongful or if his performance is so negligent as to take him outside the protection of his employment.”<sup>16</sup> In other words, regardless of the applicability of the four-factor test, an employee may be held liable for damage occurring as a result of his **gross negligence**.

Utter disregard of prudence amounting to complete neglect of the safety of another can amount to **gross negligence**. Because the definition of **gross negligence** requires a finding of the “want of even scant care,” the exercise of any degree of diligence and due care generally defeats a claim of gross negligence.<sup>17</sup>

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<sup>15</sup>These tests are discussed in fair detail in *Stanfield v. Peregoy*, 245 Va. 339 (1993).

<sup>16</sup>*James v. Jane*, 221 Va. at 52, 282 S.E.2d at 868.

<sup>17</sup>“Want of even scant care” is a standard formulation of what constitutes gross negligence. In Virginia, this standard formulation was mentioned in cases as early as 1944 and as recently as 2000. See *Chappel v. White*, 182 Va. 625, 29 S.E.2d 858 (1944) and *Whitley v. Commonwealth*, 260 Va. 482, 538 S.E.2d 296 (2000).

### Examples

- (1) A VDOT resident engineer planned the upgrade of a culvert on private property adjacent to a secondary state highway as part of a project to improve the highway. The culvert collapsed under the weight of the plaintiff's truck during a heavy rainstorm. The engineer's actions were *in furtherance of the governmental objective* of improving the state's secondary system. The *Commonwealth's interest in this objective is considered "substantial."* The engineer exercised *significant discretion* in planning the upgrade but, by law, was *subject to the direction and control of the State Highway and Transportation Commissioner*. Finding support from its analysis of the four-factor test, the court found the engineer to be immune from liability for damage. *Bowers v. Commonwealth*, 225 Va. 245, 302 S.E.2d 511 (1983).
- (2) An eastbound motorcycle and westbound automobile collided head on in the eastbound lane of the Norfolk-Virginia Beach Expressway. Because the duty to provide barriers and other traffic control devices sufficient to prevent vehicles from entering the wrong lanes of travel was within the scope of *discretionary* duties delegated to him, the Superintendent of the Expressway was immune from a claim that he had breached his duty. The fact that *discretion* was an integral part of this employee's governmental functions weighed heavily in favor of the courts granting him immunity. *Hinchey v. Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983).
- (3) A plaintiff was injured in a collision between her vehicle and a city truck spreading salt during a snowstorm. Addressing the issue of whether the employee operating the truck was engaged in *discretionary* activity, the court held that the employee was *immune* from liability because he was not engaged in "the simple operation" of the vehicle (which would have been *ministerial*). Rather, he was engaged in *discretionary* activities, such as determining the amount of salt to be applied and which streets should be salted. The court noted that the employee might have been held liable if the accident had occurred when he was driving his truck en route to the area he was assigned to plow and salt or when he was returning to headquarters after completing salting. *Stanfield v. Peregoy*, 245 Va. 339, 429 S.E.2d 11 (1993).

### Example

A police officer in pursuit of a traffic offender collided with a vehicle when he ran a red stoplight. The court found an absence of *gross negligence* because the officer had activated his red lights, had activated his siren for a short burst before entering the intersection, had driven only 5 miles over the speed limit, and had swerved and braked in an attempt to avoid a collision. *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184 (1991).

An employee is not immune from liability for **intentional torts** committed by the employee. A person commits an **intentional tort** when he or she acts with the purpose of causing harm or with knowledge that his or her actions are substantially certain to cause harm.



## HOW DOES A TORT CLAIM PROCEED?



The Tort Claims Act (Act) defines the situations in which the Commonwealth may be held liable for tort damages. The Act makes the Commonwealth liable for damages caused by the negligent or wrongful acts or omissions of any employee acting within the scope of employment. It also provides guidelines for bringing a claim against the Commonwealth and its employees.

### Legal Procedure

A person who believes that he or she has been a victim of a **tort** must first file a written statement describing the nature of the claim with the Director of the Division of Risk Management (a unit of the Department of General Services) or the Attorney General within 1 year after the occurrence of the alleged tort.

When VDOT receives notice of a **tort claim**, field personnel investigate the incident. The Office of Employee Safety and Health then reviews the results of the investigation and any other necessary information. Finally, the claim is submitted to the Division of Risk Management for a determination of appropriate action.

The Commonwealth may choose to settle or deny the claim. When the Commonwealth settles a claim, the parties agree to an amount of money the Commonwealth will pay the claimant (**plaintiff**). In addition, the claimant must sign a release relinquishing any future claims for that particular action against the Commonwealth and its employees. If the Commonwealth denies the claim, no payment is made and the tort claimant may commence an action (take the case to court).

The Commonwealth settles a large number of tort claims. Nevertheless, most claims presented against VDOT and its employees are denied. Most of these cases do not go to court, and the plaintiff sees no recovery. Yet, a small number of claims do go to court, and a few of these result in judgments against the Commonwealth. The relatively small number of successful plaintiffs does not indicate that tort claims are of minimal concern to the Commonwealth. In addition to the Commonwealth's concern that it not contribute to personal injury or property damage against its citizens, another concern is that some of these claims have the potential to result in staggering monetary awards.

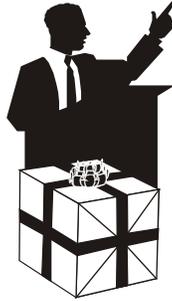
**Example:**

- (1) A court awarded \$48,712.50 to a plaintiff when he entered Route 3 in Stafford County and was struck by an oncoming vehicle. The plaintiff alleged that VDOT was negligent for failure to install a stop sign.
- (2) VDOT agreed to a \$1,569,738 settlement for a claim in which the plaintiff was severely injured when he struck a bridge expansion joint on I-495 and lost control of his motorcycle.

**Limits of Recovery**

The Act<sup>20</sup> directs that a tort claimant may not assert a claim against the Commonwealth seeking more than \$100,000; however, a plaintiff may sue an employee of the Commonwealth for an unlimited amount of damages. The Commonwealth provides legal representation for employees named in a tort suit, and in most cases, claims against employees, if successful, are paid by VDOT through the Division of Risk Management. Nevertheless, if the employee's exposure to liability is the result of a fraudulent, dishonest, intentional, or malicious act, VDOT will probably not pay the claim.

## WHAT ARE THE DEFENSES TO TORT LIABILITY?



### Contributory Negligence

As noted earlier, there can be more than one proximate cause of an injury. If the injured party's own carelessness or negligence is determined to be a contributing proximate cause to an injury, the injured party is considered **contributorily negligent**.

**Contributory negligence** acts as a bar to recovery. If a plaintiff successfully proves the defendant was negligent, the defendant may then raise the defense of contributory negligence and attempt to prove that the plaintiff, too, was negligent and a proximate cause of the injury.

The test for **contributory negligence** is the same as that for negligence: did the plaintiff fail to act as a *reasonable person* would have acted for his or her own safety under the circumstances, or did the plaintiff's actions or omissions proximately cause the injury? If the defendant succeeds in proving that the answer to both of these questions is yes, the injured party can receive no monetary recovery from the defendant.<sup>21</sup>

#### Examples

- (1) A plaintiff's vehicle struck a motor grader being used in connection with highway grading work. The plaintiff was found to be *contributorily negligent* because she failed to see the "Men Working" sign and keep proper lookout, her speed was unlawful, and she did not keep her car under proper control. *Mitchell v. Lee*, 213 Va. 629, 194 S.E.2d 737 (1973).
- (2) A plaintiff struck construction equipment that had been left on the highway at night. As a result of her excessive speed, which proximately caused her injuries, the plaintiff was found *contributorily negligent*. *Talley v. Draper Construction Co.*, 210 Va. 618, 172 S.E.2d 763 (1970).

Virginia is one of a relatively few states retaining the common-law defense of **contributory negligence**. The overwhelming majority of American jurisdictions today have legislatively or judicially rejected contributory negligence because it acts as a complete bar to recovery for injury. These states have replaced contributory negligence with a system of **comparative negligence**.

Under **comparative negligence**, the injured party’s negligence may not operate as a total bar to recovery but may help to reduce the damages owed by the defendant. The injured plaintiff’s damage award is reduced by the share of fault he or she holds for the injury. In most comparative negligence jurisdictions, injured parties holding more than 50 percent of the responsibility for their accident cannot receive any recovery at all.

## Release

Sometimes parties will sign a contract that waives one party’s right to sue the other party for tort damages. Only some of these waivers, or **releases**, are valid in a court of law.

Virginia courts have consistently held that “an agreement entered into prior to any injury, releasing the tortfeasor from liability for negligence resulting in personal injury, is void because it violates public policy . . . .”<sup>22</sup>

Virginia courts have carved out exceptions to the general rule prohibiting the waiver of liability for future personal injuries. An exception is that releases are allowed for the waiver of liability for property damages.

### Example

VDOT enters an agreement allowing a telephone company to place cable under a highway. In the agreement, the telephone company *releases* VDOT and its employees from liability for any damage to the cables. If the cables were to sustain damage because of a highway worker’s negligent actions, the *waiver* would have the force of law and neither the employee nor the Commonwealth could be held liable for the property damage.

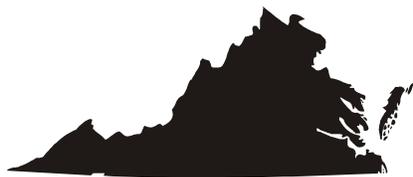
## Act of God

An **Act of God** is an accident occurring as a result of natural causes, exclusively without human intervention, such as could not have been prevented by any amount of foresight and care that *reasonably could have been expected*. A party does not have a duty to provide for contingencies that would be considered Acts of God. This defense is raised rarely today, as it merely addresses the questions of **duty** and **proximate cause** already posed by a tort claim.

### Example

A person constructing a culvert over a waterway has a duty—to adjacent landowners—to provide an opening that is sufficient to accommodate not only the normal flow of the water but also such abnormal and excessive flow as could *reasonably be expected* in times of high water and flood. Nevertheless, there is not a duty to provide for phenomenal floods that could not be anticipated or foreseen and, thus, would be considered an *Act of God*. *Southern Railway Co. v. S.F. Jefferson*, 185 Va. 384, 38 S.E2d 334 (1946).

## HOW DOES VDOT MANAGE RISK?



In response to safety concerns and the rising risk of tort liability, VDOT created a **risk management program** aimed at reducing the risk of tort liability. This program promotes various methods VDOT may use to enhance safety and reduce the risk of tort liability. VDOT employees can familiarize themselves with the risk management program by reading *What You Should Know About Risk Management in VDOT*, a handbook published by the Virginia Transportation Research Council (VTRC) and available through the VTRC library.



## WHAT ARE SOME FREQUENTLY ASKED QUESTIONS ABOUT TORT LIABILITY?



### **If VDOT makes safety improvements to a site following an accident, will the improvements indicate prior negligence?**

**Not necessarily.** Sometimes, particularly when it has been unaware of a dangerous site, VDOT will take precautions and safety measures at the site of an accident after an accident has occurred. The courts of Virginia have long held that a tort claim plaintiff cannot offer evidence of subsequent safety improvements to prove past negligence. As a matter of public policy, the state wants to encourage safety improvements, and, thus, it does not permit the fixing of dangerous sites to be used against defendants. In other words, VDOT employees should take safety precautions after an accident happens, and those precautions cannot be offered as evidence of prior negligence.

### **If I follow the employment safety guidelines, will that immunize me from suit?**

**No.** The Virginia courts have decided that an employer does not by the adoption of private rules (such as employee safety guidelines) fix the standard of its duty to others.<sup>23</sup> Accordingly, if a tort suit goes to court, the private rules are *inadmissible* as evidence either *for* or *against* a plaintiff who is not a party to such rules. In other words, if an employee follows the safety guidelines of his or her job position and injures another person, he or she may still be liable for negligence. In such a case, the employee would not be allowed to raise the fact that safety rules were followed to defend against the claim. On the other hand, if an employee fails to follow safety guidelines and injures another person, the injured party cannot use the fact that the

#### **Example**

State employees operating a dump truck and motor grader, engaging in road maintenance, and placing signs that warn of the slow-moving maintenance vehicles along the roadside are acting in accordance with the VDOT guidelines published in *Typical Traffic Control for Work Area Protection*. A driver who sees the signs nonetheless fails to slow down and rounds a blind curve at 55 mph. Upon sighting the maintenance vehicles ahead of him in his lane, the driver swerves into the opposite lane, colliding with a car traveling in the opposite direction. In this case, the VDOT employees and VDOT would not be able to present the guidelines publication as evidence. Instead, the plaintiff would have to show negligence—that the employees did not act reasonably to protect public safety. Therefore, even if the employees followed the guidelines to the letter, a court could find that the employees acted negligently, thus exposing VDOT to liability. *Pullen v. Nickens*, 226 Va. 342, 310 S.E.2d 452 (1983).

employee failed to follow guidelines as evidence of negligence. In both scenarios, the employee's actions or omissions would be judged not by the guidelines' standards but by the standard of care that could be expected of a reasonable person in the employee's situation.

It is important to note that this doctrine is limited to *private* rules that are unknown by potential plaintiffs. If the rules are generally known (e.g., if they are statutory guidelines), a court *will allow the rules to be used* to show negligence or the absence of negligence.

Although safety guidelines may be inadmissible in court, they serve an important function in promoting safety and avoiding costly lawsuits. Guidelines represent the standard of care, as determined by the employer, to be reasonable for the protection of persons and property. Nevertheless, these guidelines may not be the exclusive standards for acting reasonably. Sometimes, deviating from guidelines is justified for safety and practical reasons. Safety guidelines should be created to avoid accidents nonetheless.

The Transportation Research Board gives the following advice: Any time employees deviate from agency standards, they should be prepared to show that this change was made on the basis of an engineering analysis and that the method of operation chosen was sufficiently protective of persons and property. “[Also, t]he reason for the [decision] and its approval by competent authority needs to be documented. The point is to be able to show at some future time that a conscious, considered judgment was made, rather than an omission or oversight.”<sup>24</sup>

### **If my superior directs me to perform a task that does not meet the standard of reasonable care, am I liable for damages?**

**Probably not.** As already discussed, an employee is liable for negligence in the exercise of **ministerial functions**. If explicit orders from one's superior do not allow for changes based on the junior employee's discretion, the activity is **ministerial**. So long as the performance of the task is not done negligently, the employee will probably not be faced with a lawsuit in the event of an injury. Nevertheless, if the junior employee becomes aware of a hazard created by the **ministerial act**, he or she should immediately notify the employer of that hazard (so that modifications may be considered). Even if the employee fails to notify the employer of hazards, the agency will be charged with notice and may be liable for injury resulting from the problem. In this situation, the employee may be more likely to face a lawsuit if his or her withholding of the information was unreasonable and was a **proximate cause** of injury.

### **What are some specific situations in which VDOT might pay damages for torts?**

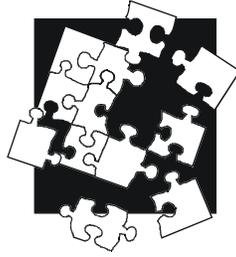
Several cases in which a court awarded damages to a plaintiff asserting a tort claim against VDOT and its employees have already been described. Some of the following issues from cases have been settled without going to court; some were resolved in VDOT's favor, and others were resolved against VDOT.

## Examples

- Blasting—damages to houses (walls and foundations), cars, and trailer homes
- Improperly maintaining stoplights
- Ice on a bridge
- Chloride contamination of private wells
- Contaminating a spring with an herbicide during brush control spraying
- Cutting trees and shrubbery on private property without permission
- Vehicle accidents caused by uncontrolled dust clouds from tractors with sweeper brooms
- Personal injuries caused by tripping on uneven sidewalks
- Cows and horses killed by consumption of cherry tree branches cut and left in pastures by VDOT
- Loose stones and gravel on the highway (from patching operations or natural buildup), causing drivers to lose control of their vehicles
- Flood damage caused by improper design of drainage (insufficient to handle heavy rains), the filling in of a natural culvert, or the failure to stabilize a VDOT work area prior to a flood
- VDOT painting activities: vehicles driving through wet traffic zone paint, resulting in vehicle damage; VDOT vehicles overspraying paint, due to the wind, onto private vehicles and private houses
- Accidents possibly caused by the absence of barriers: a bicyclist riding off the end of a street, which had no guardrail, into a creek; a person falling off a bridge that had no guardrail
- Improper signing: a vehicle striking a snow-covered concrete median; a vehicle crossing over into the opposite lane of travel and colliding with another vehicle head on
- Work zone accidents possibly caused by improper signing (rear-end collisions, vehicles running off the road to avoid stopped VDOT vehicles)
- A vehicle running off the road onto the VDOT right of way and striking a stump obscured by grass
- Accidents possibly caused by employees improperly directing traffic: vehicles boarding a ferry boat striking the transfer bridge or barrier gate; vehicles driving through work zones being waved by flaggers into oncoming traffic
- Collisions between private vehicles and allegedly negligently driven VDOT vehicles (such as motor graders and mowers)



## CONCLUSION



As the information presented in this handbook indicates, tort liability is a serious concern for VDOT, Virginia municipal corporations, and all of their employees. This handbook has sought to provide these employees with a basic understanding of the tort liability system and with illustrations of the system's contemporary application. Through heightening employee awareness of tort liability, this handbook was written to further the efforts of VDOT and municipal corporations to minimize both transportation-related injuries and liability exposure.



## GLOSSARY



**Act of God.** A defense to tort liability available when an accident is due to natural causes and could not have been prevented by reasonable care.

**Actual Notice.** Real knowledge that a person has of something.

**Breach of Contract.** The failure, without legal excuse, of party to a contract to perform any promise that forms the whole or a part of the contract.

**Breach of Duty.** The failure to perform, as a result of violating a standard of care, an agreement; breaking one's word; or otherwise actively violating one's **duty** to another entity.

**Common Law.** The body of principles and rules that derives authority not from legislations but from custom and judgments of courts recognizing, affirming, and enforcing these customs.

**Comparative Negligence.** A system of damages in tort claims whereby the injured plaintiff's damages recovery is reduced by the percentage of responsibility he or she shares with the defendant(s).

**Constructive Notice.** Knowledge that (is imported to) a person by the court (whether or not the person actually has it).

**Contributory Negligence.** A common law defense to tort liability available when the injured claimant is responsible for negligent conduct that is a proximate cause of the accident.

**Crime.** A violation of public law.

**Damage.** The loss, harm, or detriment sustained due to an injury.

**Damages.** Money claimed by plaintiff as compensation for harm done.

**Defendant.** The party named in a lawsuit as the entity having allegedly committed a wrongful act.

**Discretionary.** An act is discretionary if it has the following characteristics: (1) an authorized individual or agency was given the power and duty to make a decision; (2) the decision was made from a set of valid alternatives; and (3) the individual or agency exercised independent judgment in making the selection. *See* **Supervisory**.

**Duty.** The obligation to exercise a particular standard of care to protect persons and property.

**Governmental Functions.** An acts performed for the common good, not for particular local or pecuniary benefit.

**Gross Negligence.** Negligence showing an utter disregard of prudence, amounting to complete neglect of the safety of another.

**Injury.** Violation of a person's rights or hurt caused to a person.

**Intentional Tort.** A tort committed with the purpose of causing harm or with the knowledge that the actions are substantially certain to cause harm.

**Joint and Several Liability.** A common law tort doctrine under which negligent defendants may be held liable either as a group or individually for the entirety of the injury.

**Ministerial Act.** An act that an employee performs in a given state of facts and in a prescribed manner in obedience to authority without regard to or the exercise of his or her own judgment concerning the propriety of the act being done.

**Negligence.** The failure to exercise the standard of care that would be expected of a normally reasonable and prudent person in a particular set of circumstances.

**Notice.** Actual or constructive knowledge of a situation; an essential element of the duty to exercise reasonable care.

**Nuisance.** As it relates to roadways, a condition that imperils the safety of public highway and is dangerous and hazardous in itself.

**Pecuniary.** Performed for money or financial gain.

**Per se.** In itself or intrinsically.

**Plaintiff.** The party who brings a lawsuit complaining of an injury.

**Proprietary Functions.** Acts performed for local or **pecuniary** benefit by a municipality.

**Proximate Cause.** An act or omission that produces an event and without which the event would not have occurred.

**Question of Fact.** An issue of fact in which the truth or falsity is to be determined by the jury or factfinder. Questions of law are determined by a judge.

**Release.** The giving up of a claim or right to the person against whom the claim exists.

**Respondeat Superior.** The doctrine holding an employer liable for the negligence of its employees if the negligence occurred in the scope of employment.

**Right.** The justly entitled power or privilege of one. The interest one has in a piece of property.

**Risk Management Program.** A program an entity implements to reduce its risk of tort liability.

**Sovereign Immunity.** The doctrine holding that a government cannot be sued in tort without its consent.

**Strict Liability.** The doctrine directing courts to hold a person accountable for damages caused by the person engaging in ultrahazardous activities, even in the absence of negligence.

**Supervisory.** An act is discretionary if it has the following characteristics: (1) an authorized individual or agency was given the power and duty to make a decision; (2) the decision was made from a set of valid alternatives; and (3) the individual or agency exercised independent judgment in making the selection. *See* **Discretionary.**

**Tort.** Any civil wrong or injury to person or property, independent of a contract; it is the violation of some duty owed to the injured person.

**Tort Claim.** A legal instrument that provides for a remedy in a situation where one is injured by the acts or omissions of another.

**Tortfeasor.** A party who has committed a tort.

**Workers' Compensation.** A form of insurance that provides compensation to employees sustaining injuries that are caused by an accident, arise out of the employment and occur in the course of employment. Workers' compensation applies regardless of the fault of the employer, co-employees, or injured employee and prohibits the resort to tort remedies for compensation.